No. 07-5422-ag

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

SPECIAL TOUCH HOME CARE SERVICES, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a Board Decision and Order issued

against Special Touch Home Care Services, Inc. ("the Company") on September 29, 2007, and reported at 351 NLRB No. 46. (SA 1-14.)[1]

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), the unfair labor practices having occurred in the state of New York.

The Board filed its application for enforcement on December 3, 2007. The filing was timely; the Act places no time limit on the institution of proceedings to enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate 47 economic strikers to their former or substantially equivalent positions of employment.

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[1] "A" references are to the Joint Appendix. "SA" references are to the Special Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by interrogating employees about their support for and activities on behalf of the Union.

STATEMENT OF THE CASE

Acting on a charge filed by 1199 SEIU HealthCare Workers ("the Union"), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing and refusing to reinstate, or offer to reinstate, economic strikers. (SA 1; A 812-22.) The complaint further alleged that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by interrogating employees about their activities on behalf of the Union.[2] (SA 1; A 818, 821.) Following a hearing, a judge found that the Company violated Section 8(a)(3) and (1) by failing and refusing to reinstate economic strikers who unconditionally offered to return to work and violated Section 8(a)(1) by interrogating employees about their union activities. (SA 12.) The Company filed exceptions. (A 1060.) The Board issued a Supplemental Order, reported at 349 NLRB No. 75 (2007), striking the Company's brief in support of exceptions for failing to conform to the Board's rules after the Company twice filed non-conforming documents. (A 1123.) The Board accepted the Company's exceptions. (A 1123.) The Board found, in agreement with the

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[2] Additional complaint allegations are not at issue in this case.

judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by engaging in the aforementioned conduct.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Home Care Services; the Aides' Assignment Procedures, Duties, and Hours of Work

The Company provides home care services throughout New York City as a subcontractor for nursing and health services providers. (SA 1, 7; A 439.) In June 2004, the Company employed about 2500 aides, of whom about 1400 were assigned to specific clients at any given time. (SA 7; A 447.) The remainder of the Company's workforce of aides formed an "on-call" pool of employees available for ad hoc assignments. (SA 7; A 473, 508.)

The Company's clients are individuals who are elderly or sick, for example, a client may have a broken leg, be recovering from a stroke, or have Alzheimer's or Parkinson's disease. (SA 7; A 82, 203, 214, 245, 379, 419.) Clients live in their own private homes, sometimes with family members. (SA 7; A 182, 346, 393, 439.) Clients receive home-health services anywhere from 2 hours per week to 4 hours a day/5 days per week, up to a 24/7 basis with various employees covering the time. (SA 7; A 495.) More than half of the Company's clients receive services for approximately 20 hours per week. (SA 7; A 496-97.) The number of hours per day is related to the clients' needs and their insurance coverage. (SA 7; A 498-99.)

Home-health aides report to coordinators, who assign clients and set schedules consistent with a plan of care. (SA 1; A 450.) Aides can be assigned to clients for various periods of time. (SA 7; A 450-51.) Aides are assigned to clients primarily based on the ability to speak a common language. (SA 7; A 448, 529.) The four major languages are English, Spanish, Chinese, and Russian. (SA 7; A 448.)

Aides provide in-home services including cleaning, shopping, cooking, bathing, and reminding clients to take their medications. (SA 7; A 58, 114, 204, 206, 215, 297, 379-80.) Aides are not licensed and are prohibited from providing any kind of medical services. (SA 7; A 458, 460.) Pursuant to a doctor's order, a nurse from a contracting agency determines the amount of care necessary and appropriate for each client and visits the home to make sure it is set up for the client. (SA 7; A 440, 444-45.)

Aides report directly to clients' homes. (SA 1; A 117, 721.) Attendance is checked either through a call by a coordinator confirming aides are at work or by an aide calling to punch-in over the phone. (SA 1; A 117, 453, 721.) The Company maintains a rule that aides must call-in if they will not be at work. (SA 8; A 75, 505, 880.) When aides cannot report for a shift, the Company will send a replacement aide, if the client agrees. (SA 7; A 512.)

B. The Union's Sends a 10-day Strike Notice; The Company Calls its Employees; The Aides Strike on June 7; The Aides Contact the Company and Attempt to Return to Work

On May 27, 2004, the Union sent a 10-day notice to the Company stating that there would be a 3-day strike by the aides commencing on Monday, June 7, 2004 at 6 a.m. and ending on Thursday, June 10, 2004 at 6 a.m. (SA 1, 7; A 521, 823.) The Union had planned a citywide strike of home-health aides for this time period. During the week prior to June 7, at the behest of the New York State Department of Health, the Company's supervisors and coordinators contacted employees and asked if they would be taking any time off the following week. (SA 7; A 70, 219, 246, 286, 345, 375, 522-24, 721-22.) Of those contacted, 75 employees indicated that they would be off either from June 7-9 or some portion of that time. (SA 1, 7; A 525.)

On June 7, 48 additional employees engaged in the strike, the majority of whom were Spanish speakers. (SA 2, 7; A 528, 840-42.) Of this group, 46 went on strike for only 1 day and sought to return to their previous assignments the next day, June 8. (SA 2, 8; A 60, 116, 185, 415.) All of the 46 employees who went on strike for 1 day either contacted the Company after the strike on June 7 to indicate they would return the next day, attempted to return to their clients on the afternoon of June 7, or reported for their shifts at their clients' homes on June 8. (SA 2, 10 n.9; A 61, 116, 185, 215-16, 240, 347, 350, 376, 394, 414-15.) These employees

were informed that they were not to report to work until further notice. (SA 2; A 61, 116, 118-19, 188, 216, 241, 351, 376-77, 395, 416, 539.) The 48 employees were not put back to work until at least June 14. (SA 8; A 63, 65, 191, 288-89, 354, 378, 397, 416-17, 545-46.) Of the 75 employees who had responded to the Company's inquiry that they were going on strike, 73 were immediately put back to work at their previous assignments. (SA 8; A 549.)

C. The Company's Letter to the Aides; The Aides' Reassignments

The Company's Director of Operations, Linda Keehn, sent letters to the 48 employees on June 14 stating that the employees had violated a company policy requiring that employees call in if they will not be reporting to their assignments. (SA 8; A 545-46, 863-67.) The letter stated that a number of aides "were confused whether they needed to call in" and noted the Company's understanding that the Union told some aides that it was not necessary to call in. (SA 8; A 863, 866.) In these circumstances, the letter continued, the Company thought termination of employees was not appropriate and employees would not be discharged. (SA 8; A 863, 867.)

Some of the 48 strikers were permitted to return to their former assignments after June 14. (SA 10; A 62-63, 387, 560, 840-42.) Other employees were not returned to their prestrike clients, had to wait to be reassigned to a new client, and did not have the same schedule and/or number or hours per week. Specifically,

Norma Lindao, who had been regularly assigned to the same 2 clients prior to June 7, was given temporary assignments until July 24, when she was given a new long-term assignment with fewer hours than she had before the strike. (SA 10; A 412-13, 418.) Reina Santiago had the same full-time weekday client for 3 years prior to the strike; after the strike, she was given only brief temporary assignments until August 2004 when she was given another regular assignment. (SA 10; A 392, 397-98.) Ramona Then had one weekday client and one weekend client prior to June 7; two weeks after the strike, she was returned to her weekday client only. (SA 10; A 373, 387-88.) Lidia Solano was regularly assigned to the same client on weekdays from 9 a.m. to 1 p.m. (SA 11; A 285.) After June 14 until sometime in September 2004, Solano received only temporary assignments. (SA 10; A 289-90.) Altagracia Matos had a 40-60 hour per week regular assignment. (SA 11; A 263.) After the strike, beginning in late June, she was given short-term assignments, ranging from a half-day per week to 5 days per week. (SA 11; A 267-68.) Lazarus Phillips had been working for the Company for 6 years and had a regular assignment prior to the strike. (SA 11; A 213.) Afterward, he was willing and able to work but was not offered any reassignments. (SA 11; A 216, 222.)

The Company did not reassign other strikers and they became employed elsewhere. Maria Nieves had been assigned to the same client for more than 3

years. (SA 11; A 344.) Following the strike, she was not permitted to return to that client and was given offers for replacement assignments for 4-6 hour shifts. (SA 11; A 354, 360.) Zoila Nivelo had one Monday to Friday 9 a.m. to 1 p.m. client and one weekend client before the strike. (SA 11; A 114.) After being removed from her assignments, Nivelo began working for another agency on June 15. (SA 11; A 119.)

In two cases, the clients and their aides moved to other agencies when their aides were not returned to them after the strike. On June 8, when she reported to work, Melania Navarro was told that she was not to work with her assigned client and should leave the client's home. (SA 11; A 242-43.) However, the client's son hired Navarro directly out of his own pocket, before having his father transferred to another agency for which Navarro went to work. (SA 11; A 242-43, 904.) Likewise, Petra Ortiz transferred to another agency to keep working with her pre-strike client. (SA 11; A 190-91, 591-92, 906.)

D. The Union's Representation Petitions; the Union Election; Supervisors Question Employees About Signing a Union Card and the Union Election; the Union is Certified

On May 26, 2004, the Union filed a petition, which was later withdrawn, to represent the home-health aides. (SA 1, 7; A 520-21.) A second petition was filed on June 21, 2004. (SA 1, 7; A 521.) A mail ballot election was scheduled for August 2004. (SA 1; A 166.)

In July, a coordinator named Lydia called aide Miriam Perez and asked if she had signed a union card. (SA 1 n.3, 12; A 155.) Lydia asked Perez how she found out about the Union and what the Union had offered employees. (SA 1 n.3, 12; A 155.) On or about August 23, coordinator Carmen Vasquez called aide Solia Peguero and asked if she had received an election package from the union. (SA 1 n.3, 12; A 167.) Vasquez told Peguero to let her know when the package arrived so Vasquez could help her vote. (SA 1 n.3, 12; A 167.)

The Union was certified as the aides' collective-bargaining representative on November 2, 2005. (SA 1.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On September 29, 2007, the Board (Chairman Battista and Members Liebman and Kirsanow) issued its decision finding, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act by failing and refusing to immediately reinstate economic strikers who offered to return to work. (SA 5.) The Board further found that the Company violated Section 8(a)(1) of the Act by interrogating employees about their support and activities for the Union. (SA 5.)

The Board's Order requires the Company to cease and desist from failing to immediately reinstate economic strikers who offered to return to work to their former positions of employment or substantially equivalent positions of

employment. (SA 5.) The Order also requires the Company to cease and desist from interrogating employees about their support or activities for the Union. (SA 5.) Affirmatively, the Order directs the Company to offer those strikers who have not yet been returned to their former jobs, or those who have had their hours or other terms and conditions of employment changed since the strike, immediate and full reinstatement to their former positions, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. (SA 5.) The Board also ordered the Company to make whole the striking employees who unconditionally offered to return work, and who were not reinstated immediately, for any losses incurred due to denial of reinstatement to their normal assignments and remove from its records all reference to unlawful action taken against the 47 discriminatees,[3] informing them in writing that this has been done. (SA 5.) The Board's Order further requires the Company to post a remedial notice. (SA 5.)

SUMMARY OF ARGUMENT

The home-health aides engaged in an economic strike on June 7—a strike the Company had full knowledge of 10 days in advance—following which 47

[3] The Board has identified 47 discriminatees among the 48 home-health aides who went on strike June 7 and were not immediately reinstated upon their offers to return to work. The Board found that the other striker, Crecencia Miller, was lawfully discharged. (SA 1.)

aides attempted to, but were not permitted to, provide services to their clients. The Company refused to reinstate them upon their unconditional offers to return to work. None of these aides were put back to work until at least June 14 and many were never permitted to return to their regularly-scheduled clients. Instead, they had to wait weeks, and in some cases months, to be given regular assignments, often enduring fewer hours than their pre-strike assignments.

The Board rightfully rejected the Company's meritless claim that the aides lost the Act's protection because they failed to follow the Company's call-in rule or left clients in "imminent danger." The Union gave the Company an undisputedly lawful Section 8(g) notice of its intent to strike on June 7. Employees are not required to give individual notice of their intent to strike and are not required to call-in to report that they will be absent while on strike. Having known about the strike, the Company cannot put the burden on the aides if it was unprepared for the strike. Moreover, the Company is simply wrong that the aides left their clients in "imminent danger." To the contrary, the evidence fully demonstrates that the aides, who perform no medical services, informed their clients and/or the clients' families that they would be on strike and no client's health and safety was jeopardized. Furthermore, the Company has failed to establish that the employees who replaced the aides during the strike were permanent replacements.

The Company's assertion that its coordinators' coercive interrogations of employees were not unlawful because the coordinators were not stipulated to be supervisors is erroneous. The Company admitted that the coordinators are its agents and, thus, the Company violated Section 8(a)(1) of the Act when its coordinators interrogated the aides.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO IMMEDIATELY REINSTATE 47 ECONOMIC STRIKERS TO THEIR FORMER OR SUBSTANTIALLY EQUIVALENT POSITIONS OF EMPLOYMENT

A. Standard of Review

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). The Court will not reject factual findings unless "no rational trier of fact could reach the conclusion drawn by the Board." *G&T Terminal*, 246 F.3d at 114. Therefore, "the findings of the Board 'cannot lightly be overturned,' especially when these findings are based upon the Board's assessment of witness credibility." *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) (quoting *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 464 (2d Cir. 1973)).

B. Economic Strike and Strike Notice Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the "right to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The employees' right to engage in primary strike activity in support of economic demands is fundamental to the Act. Indeed, this right is expressly recognized in Section 13 of the Act (29 U.S.C. § 163): "Nothing in this Act . . . shall be construed . . . to interfere with or impede or diminish in any way the right to strike . . . ."

Implementing Section 7's guarantee, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. Further, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization."

Under Supreme Court precedent, an employer that refuses to reinstate economic strikers violates Section 8(a)(3) of the Act unless it can demonstrate that it acted to advance a "legitimate and substantial business justification." *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)); *see also New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 191 (2d Cir. 2006). An employee whose work has

ceased as a consequence of a labor dispute continues to be an "employee" under the Act if she has not obtained regular and substantially equivalent employment. *See* 29 U.S.C. § 152(3); *see also Waterbury Hosp. v. NLRB*, 950 F.2d 849, 854 (2d Cir. 1991). So long as the individual remains an employee under the Act, she has the right to be reinstated after the dispute is resolved. *Fleetwood Trailer*, 389 U.S. at 381; *Waterbury Hosp*., 950 F.2d at 854.

Congress amended the Act in 1974 to bring workers employed by nonprofit health care institutions within the coverage of the Act and granted them all the rights and protections provided by the Act, including the right to strike. Senate Comm. on Labor and Public Welfare, S. Rep. No. 93-766, at 1 (1974) and H.R. Rep. No. 93-1051, at 1-2 (1974), *both reprinted in* 1974 U.S.C.C.A.N. 3946, *and in* Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, 8, 269-70 (Comm. Print 1974). In doing so, Congress balanced the right of health care workers to engage in a strike with a health care employer's need to maintain stability in its operations. *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1247 (2d Cir. 1990).

Section 8(g) of the Act (29 U.S.C. § 158(g)) requires a labor organization to give written notice to a health care institution at least 10 days before engaging in

any strike, picketing, or other concerted refusal to work.[4] Section 8(g) imposes no notice requirement on employees. *Bethany Medical Ctr.*, 328 NLRB 1094, 1094 (1999); *see also Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 515-16 (2d Cir. 1980). Employees in the health care field have the same right to strike as other employees, but the notice provision gives health care employers the time to arrange for uninterrupted client care. Section 8(g) ensures continuity of care by mandating that health care employers receive sufficient advance notice of a strike to allow them to make timely arrangements to protect the continuity of service to their clients. *See District 1199, National Union of Hospital and Healthcare Employees*, 232 NLRB 443, 445 (1977), *enforced*, 582 F.2d 1275 (3d Cir. 1978) (table); *Walker Methodist Residence*, 227 NLRB 1630, 1631 (1977). Such notice allows the institution to assess the extent to which normal operations may be disrupted. *See Retail Clerks Union Local 727*, 244 NLRB 586, 587 (1979).

Strict adherence to the notice requirements fully satisfies the underlying policy consideration of Section 8(g). The interests of both the employees and the

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[4] Section 8(g) states:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, no less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

health care provider are satisfied. The union is given the opportunity to establish the date and time that is most advantageous; the health care employer is provided the degree of certainty in the date and duration of the strike necessary to plan for continuity of care.

C. Substantial Evidence Supports the Board's Finding that the Company Violated Section 8(a)(3) and (1) of the Act by Refusing to Immediately Reinstate the 47 Striking Home-Health Aides to Their Former or Substantially Equivalent Positions of Employment

It is undisputed that the home-health aides engaged in an economic strike, announced by a lawful Section 8(g) notice, and made an unconditional offer to return to work. The Board found (SA 1), based on substantial evidence in the record, that the Company violated Section 8(a)(3) and (1) by failing to immediately reinstate the aides to their former or substantially equivalent positions. Simply, the aides were employees when they went on strike the morning of June 7 and continued to be employees when they spoke to their coordinators about returning to work or attempted to report to their clients' homes and were told that they must leave. As employees who had made unconditional offers to return to work, the aides were entitled to reinstatement. *See Fleetwood Trailer*, 389 U.S. at 378; *Waterbury Hosp.*, 950 F.2d at 854.

It is undisputed (Br 59) that the Company did not permit those strikers to return to their clients notwithstanding their offers and attempts to do so, and 47 aides were not reinstated until at least June 14, one week after the strike. In fact,

aides were told not to return to their jobs, and in some cases to leave their clients' homes where they reported for work—often against the express wishes of clients and their families. (SA 10-11; A 186, 242, 352, 591-92.) Aides were denied reinstatement to positions with clients who felt comfortable with specific aides who had been coming to their homes for months and, in some cases, years. For example, both Reina Santiago and Maria Nieves had been with their clients for more than 3 years at the time of the strike, and were not reinstated to those clients. (SA 10-11; A 344, 392.) Ms. Santiago was instead given only brief temporary assignments until she was reassigned to a different regular client 2 months later. (SA 10; A 397.) Ms. Nieves was offered temporary replacement assignments for 4-6 hour shifts and weekends. (SA 11; A 354-55, 360.) The situations of Ms. Santiago and Ms. Nieves are hardly unique. Other aides were not reinstated to their pre-strike clients and were given temporary assignments and/or fewer hours for months after their 1-day, or in a few cases, 3-day strike. (SA 10-11; A 267-68, 289-90, 417-18.) In two cases, long-term clients left the Company, and moved to another agency, to retain the services of their pre-strike aide because the Company would not permit the aide to return to work. (SA 11; A 190-91, 242-43, 591-92, 904, 906.)

On these facts, the Company clearly "unlawfully failed to reinstate the discriminatees to their former positions of employment or substantially equivalent

positions." (SA 1 n.3.) Thus, the Company violated Section 8(a)(3) and (1) of the Act.[5]

D. The Company's Arguments that It was Not Required to Reinstate the Aides Because They Lost the Protection of the Act are All Without Merit

The Company asserts (Br 28), on two separate yet equally unavailing grounds, that the aides lost the Act's protection. On one hand, the Company argues (Br 36) that the aides were required to call-in and give individual notice that they would be on strike on the morning of June 7. Failure to call-in, the Company asserts, cost the aides all rights under the Act. In a related vein, the Company contends (Br 44) that the aides' conduct in going on strike without calling in was indefensible. Then, failing to show that the aides lost the protection of the Act, the Company contends (Br 57) that the aides were permanently replaced. Lastly, the Company claims their delay in reinstatement was justified. As shown in turn, these contentions were properly rejected by the Board as meritless.

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[5] The Board's finding did not rest on any discriminatory enforcement of the Company's rules or discrimination based on individual employee's union activity, nor, despite the Company's erroneous assertion (Br 54-56), was the Board required to make such findings in order to establish a violation of Section 8(a)(3) and (1) in the circumstances of this case. *See Fleetwood Trailer*, 389 U.S. at 378; *Waterbury Hosp.*, 950 F.2d at 854.

1. Following the Union's Section 8(g) notice, the employees were not required to give individual notice of their intention to go on strike and thus did not lose the protection of the Act

The Company asserts (Br 36) that its call-in rule, requiring aides to notify the Company the day before they will not be at work, means that any aide who did not call-in prior to going on strike engaged in unprotected conduct. As the judge found, however, if such a rule could require individual notice from striking employees, "an employer could, by enactment of a private rule, nullify the public rights guaranteed by a statute of the United States." (SA 9.) Indeed, the Company's notion has been rejected by the Supreme Court. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (a plant rule requiring permission from a foreman to engage in a protected work stoppage does not permit an employer to discharge an employee for violating the rule).

The Company is, at base, asking for a two-step notification process. First, the Union must provide notice under Section 8(g). The Company admits (Br 15) that, on May 27, the Union sent a notice to the Company advising it that a 3-day strike by the home-health aides would take place beginning on June 7 at 6 a.m and ending on June 10 at 6 a.m. It does not dispute that the notice complied with Section 8(g)'s requirements.[6] (A 437-38.) Then, under the Company's argument,

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[6] The Board found (SA 1 n.6) that the notice complied with Section 8(g). However, because it was unnecessary to the resolution of the case, the Board did not make a determination as to whether the Company is a health care institution

each individual employee who intends to participate in the strike must provide a second, individual notice. In fact, according to the Company's argument, under its call-in rule, each individual employee must provide a particular form of notice for each day from June 7 to June 10 that he or she chooses to participate in the strike.

Contrary to the Company's proposal, this Court has specifically held that employees "are not required to call in each day of a strike" and "advising . . . employees that a 'call-in' [i]s required interfere[s] with their right to strike." *NLRB v. Pratt & Whitney Air Craft Div., United Technologies Corp.*, 789 F.2d 121, 131 (2d Cir. 1986) (finding a violation of Section 8(a)(1) where an employer told workers that, in the event of a strike that was planned but did not occur, they would be required to call in each day). Additionally, as in *Montefiore Hospital*, if the Court were to adopt the position that any strike by home-health aides was unprotected because they did not give individual notice, the Court "would in effect by rewriting § 8(g) in the very manner [it] ha[s] concluded that Congress did not intend." 621 F.2d at 516 (expressly rejecting the notion of an individual notice requirement for health care employees); s*ee also Kapiolani Hosp. v. NLRB*, 581 F.2d 230, 233 (9th Cir. 1978) (same).

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within the meaning of Section 2(14) of the Act (29 U.S.C. § 152(14)) such that the notice was required.

In *Kapiolani Hospital*, an unrepresented hospital ward clerk went on strike without following the employer's call-in policy. *Id.* at 231-32. The clerk was not in the employee group covered by the 8(g) notice that the union had submitted. *Id.* at 232. Thus, the employer had no advance notice that the employee might be going on strike. Nevertheless, the court rejected the employer's argument that the clerk was lawfully fired for engaging in the strike without following the employer's call-in rule. *Id.* at 234. In both *Montefiore Hospital* and *Kapiolani Hospital*, other employees joined in the strike who were not covered by the notice given by the union, or any other kind of notice, and those employees retained the Act's protection.

The Company's call-in rule should not be treated any differently from the call-in rules in *Pratt & Whitney* and *Kapiolani Hospital*, which did not require striking employees to call in prior to participating in a strike in order to retain the protection of the Act.[7] The Board has refused to read rules requiring notice in

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[7] The Company's reliance (Br 43) on dicta in *Montefiore Hospital*—as requiring employees to respond to an employer survey of which employees will be working during the strike in order have the protection of the Act—is misplaced. In *Montefiore Hospital*, the Court noted that the doctors who joined the strike and were not covered by the Section 8(g) notice "might" be in a different position if they had affirmatively told the employer that they would not participate in the strike. 621 F.2d at 516. The Court observed that a hospital "might find it advantageous" upon receipt of a strike notice to take a survey of "the rest of its employees" *not* covered by the notice to ascertain who would be participating in the strike. *Id.* None of those circumstances are present here.

such a manner as to preclude the right to strike. *See Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (rule prohibiting nurses from abandoning their shifts without permission did not on its face violate Section 8(a)(1) because employees could not reasonably read the rule to prohibit them from engaging in strikes or similar concerted activity), *rev'd sub nom. on other grounds*, *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

The "plant rule" cases on which the Company relies are inapposite. The aides' participation in a strike announced 10 days earlier is quite distinct from situations where the Board has found conduct to be unprotected because employees engaged in a sudden cessation of work on a production line in violation of a plant rule designed, in part, to safeguard the plant and its equipment. *See Terry Poultry*, 109 NLRB 1097, 1097-98 (1954) (employees who walked away from a moving production line of chickens to present a grievance to management engaged in unprotected conduct); *Gen. Chemical Corp.*, 290 NLRB 76, 83 (1988) (employees who walked away from an operating chemical production line to participate in a surprise strike engaged in unprotected conduct). While an employer can "make and enforce reasonable rules governing the conduct of employees *on company time*," *Terry Poultry*, 109 NLRB at 1098 (emphasis added), here the aides were clearly not on company time and they participated in a strike on the morning of June 7 announced well in advance of its commencement. Nor, as shown below,

did the Company establish that the aides' absence posed any imminent threat to their clients' well-being.[8]

2. The employees did not engage in "indefensible conduct"

The Company further argues (Br 44) that the aides should be denied the protection of the Act because, during the strike, their clients were left without services for part, or in a few cases, all of a shift. Such conduct, the Company argues, was indefensible as it created a reasonably foreseeable imminent danger for the clients. For a strike to be unprotected on the basis that concerted activity destroys property or endangers life or limb, "more must be shown than that the activity caused inconvenience . . . [t]he whole purpose of a strike is to impose costs on the employer, in the hope of making him come to terms." *East Chicago Rehabilitation Ctr. v. NLRB*, 710 F.2d 397, 404 (7th Cir. 1983) (*citing NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955)). The record evidence fails to show that any of the aides put their clients in jeopardy. To the contrary, the aides told their clients or their families that they would be absent

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[8] The Company's citation (Br 33, 37) to *La Mousse, Inc.*, 259 NLRB 37 (1981), adds nothing to its argument. There, the Board found lawful the discharge of three employees for failure to call in before missing work because the call-in rule did not constitute a unilateral change from the employer's prior collectively-bargained policy. *Id.* at 49-50. There was no strike in that case and the employees did not miss work to engage in concerted activity.

for the day. Thus, the record demonstrates only that the strike caused the Company some inconvenience as it had to use its on-call list of 1000 employees more than it had anticipated in preparing for the strike.

The Company's characterization (Br 45) of its clients as being in "foreseeable imminent danger" in the absence of an aide is unsupported by the record evidence. Home-health aides do not provide, are not licensed to provide, and are strictly forbidden from providing, any medical services. (SA 7; A 458, 460.) The Company's clients may live alone, and, if they do not, they spend time alone in their residences when family members are not present, or even when their aides go on errands for them during a shift. (A 182, 393, 480-81.) The number of hours a client receives services from an aide may be as little as 2 hours per week, and can be capped based on the client's insurance coverage. (SA 7; A 495, 499.) Moreover, the Company sends a replacement aide to the home of a client whose aide has not reported for a shift only if the client "agrees to the replacement." (A 512.) Thus, there may be times when a client does not receive services for a shift if she does not agree to see a replacement aide.

In *East Chicago Rehabilitation*, the court rejected the employer's argument—repeated by the Company here—that a walkout by nurse's aides, orderlies, and maintenance workers was unprotected because it endangered the health of nursing home patients. 710 F.2d at 404. That case, unlike here, involved

a wildcat strike by employees that was not preceded by a union's 10-day advance notice under Section 8(g). The Board concluded that "although some patient care schedules were not completely adhered to," there was no showing that any patient's safety or health was jeopardized. *Id.* Some patients were late in getting their breakfast or medication or having their sheets changed, and there was also a delay in removing the body of a patient who died. *Id.* at 405. The court noted, as here, that the nurse's aides were not professionals and did not have responsibility for critical care.[9] *Id.*

The medical equivalent of conduct that could render a strike unprotected would be a nurse walking out of an operating room in the middle of surgery. *East Chicago Rehab*, 710 F.2d at 405; *see also Montefiore Hosp.*, 621 F.2d at 517 (conduct of doctors who went on strike without giving notice was not "inherently destructive" unprotected conduct; such conduct would be where patients were "left lying on the operating table" or "people in need of immediate treatment were left to fend for themselves").

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[9] In contrast, in *NLRB v. Federal Security*, 154 F.3d 751 (7th Cir. 1998), armed guards engaged in unprotected conduct when they walked off the job during a shift at a public housing project where they were "stationed at each passage at all hours," specifically for the purpose of responding to life-threatening situations in an area of high crime. *Id.* at 756. The court in *Federal Security* distinguished *East Chicago* in part on grounds equally applicable here—that the "'aides are not professionals and are not entrusted with critical care responsibilities.'" *Id.* (quoting *East Chicago Rehabilitation*, 710 F.2d at 405.)

In contrast, the Company's clients were able to be alone and the aides, when present, did not provide medical services of any kind. (SA 7; A 182, 393, 458, 460, 480-81.) The concerted activity by the aides was not "indefensible" because the health and safety of clients was not endangered. *See, e.g., Bethany Medical Center*, 328 NLRB 1094 (1999) (employees in a catheterization lab gave 15-minute notice of their strike, and although five patient procedures were scheduled for that morning, did not engage in "indefensible" conduct because the health and safety of patients was not endangered). As the judge found here, the evidence "does not establish that such a[n imminent] danger existed in this case." (SA 10.)

The Company's assertion (Br 45) that aides "failed to take reasonable precautions" rings hollow in the face of evidence that the aides told either the client or a family member that they would miss one day of work. Having been told by the Union that 8(g) notice had been given and that they did not need to tell the Company that they would be participating in the strike (SA 8, A 71, 381, 401), the aides nonetheless notified the clients or the clients' families in advance that they would not be at work on June 7, allowing for any necessary preparations to be made. (SA 10; A 64, 80, 93, 119, 188, 240, 249, 267, 348, 379, 394, 415.) Indeed, the Company can point to no instance where a striking aide failed to notify the client or a family member that the aide would be on strike on June 7. (A 59, 80,

119, 185, 238, 247, 265, 347, 375, 394, 415.) In the face of this evidence, the Company's claim (Br 21) that the aides "abandoned" their clients is simply wrong.

Perhaps the "strongest evidence" that clients were not endangered by the aides' absence, as the Seventh Circuit noted in *East Chicago*, was that "when management learned that the workers were willing to resume work immediately it refused to take them back." *Id.* That same evidence supports the Board's finding here: the Company refused to take the aides back even when they reported for work at their clients' homes, ordering them to leave the clients' homes. (A 61, 119, 188, 215-16, 241-42, 351, 377, 395, 415-16.) For example, on June 9, aide Rejna Santiago reported to work at her client's home and was told on the phone that she was not supposed to be there and was ordered to go home, despite the fact that no replacement aide was there with the client and none was sent by the Company that day. (A 395-96.) As in *East Chicago*, "unless the C[ompany] wanted to be prosecuted for criminal neglect it would not have done this if there were danger to its [clients]." *Id.*

The Company, which is seemingly so concerned about the well-being of its clients, nonetheless callously ordered the aides to leave the homes of their regular clients when they reported for duty the day after the strike. Further punishing not simply the aides, but also the clients they profess to care deeply about, the Company continued to refuse to reinstate the aides to their former regular clients,

leading at least two clients to move to other agencies to retain the good services of these aides. In these circumstances, it can hardly be argued that it was the aides that failed to protect the clients.

Finally, the Company's claim (Br 17, 50) that some clients received only partial services on the first day of the strike does not constitute indefensible conduct on the part of the aides sufficient to rob them of statutory protection. The dates of the 3-day strike were fully broadcast to the Company 10 days ahead of schedule. The Company had, by its own account (Br 14, A 447, 507), at least 1000 aides on its active roster who did not have assignments in June 2004. The Company's Vice President of Operations, Linda Keehn, explained, "there is always a core group of people who are available to work on a per diem basis, or an on-call basis . . . they can be sent on these replacement assignments." (A 508.) As the Company states (Br 47), the "10-day notice period afforded [the Company] sufficient time to make appropriate arrangements . . . ." The onus was on the Company to prepare for the strike.

The Company's decision (Br 47-48) to rely on the answers the aides gave when the Company canvassed them, at the behest of the New York Department of Health, was the Company's risk alone. The aides were under no obligation to provide individual notice to the Company, nor were they required to make a decision as to whether to participate in the strike a week in advance. Indeed, the

record shows that some aides were not aware of the strike when they were asked by the Company if they would be working on June 7 (A 59, 209, 345), and aides had also been truthfully told by the Union that notice to the Company had already been provided (A 71, 381, 401, 544). Moreover, it is not unusual in a strike situation for other employees to join a strike. *See Montefiore Hosp.*, 621 F.2d at 512; *Kapiolani Hosp.* 581 F.2d at 231-32. Ten days after the strike was announced, the Company realized "all of a sudden" (Br 48, A 530) that additional aides had joined the strike. Poor administration on the Company's part does not, and should not, mean that employees are stripped of their right to strike.

3. The Company did not meet its burden of showing that the aides were permanently replaced

The Company did not meet its burden of establishing that the employees who filled the strikers' shifts beginning on June 7 were permanent rather than temporary replacements. (SA 10.) *See Waterbury Hosp.*, 950 F.2d at 855 (burden is on employer to show that replacements are permanent). To meet this burden, the Company had to show a mutual understanding between the Company and the replacements that they were permanently assigned to the strikers' clients. *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), *enforced*, 63 Fed. Appx. 520 (D.C. Cir. 2003); *Chicago Tribune Co.*, 304 NLRB 259, 261 (1991). In other words, the Company had to show that the "replacements were hired in a manner that would show that the men [and women] who replaced the strikers were

regarded by themselves and the [Company] as having received their jobs on a permanent basis." *Consolidated Delivery*, 337 NLRB at 526 (internal quotation omitted). Moreover, "[a]bsent evidence of a mutual understanding, the [Company's] own intent to employ the replacements permanently is insufficient." *Id.*

The Company argues only (Br 55) that it "used its current, active employees as permanent replacements." The Company did not offer evidence of a mutual understanding between itself and the employees who covered the shifts on June 7 that they would be permanently assigned to the striking aides' clients. As the Board found (SA 4 n. 15), the Company "failed to present any detailed evidence to clarify the status of the replacements drawn from the [Company's] established roster of employees." Relying solely on the Board's finding that the employees were drawn from its established roster, the Company's apparent conflation (Br 57-58) of the terms "permanent employee" and "permanent replacement" is unavailing. The evidence fails to show that those employees who covered shifts on June 7, while in the Company's on-call pool of employees, had any understanding with the Company that they were permanently assigned to the strikers' clients.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEES ABOUT THEIR SUPPORT FOR AND ACTIVITIES ON BEHALF OF THE UNION

The Board's finding that the Company's questioning of employees Miriam Perez and Soila Peguero constituted coercive interrogations is supported by substantial evidence in the record. Coercive interrogations of employees concerning their union activities violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 97-98 (2d Cir. 1985) (asking employee whether he had signed a union card and whether he was "for it" unlawful); *NLRB v. Solboro Knitting Mills, Inc.*, 572 F.2d 936, 939-40 (2d Cir. 1978) (questioning of employees as to whether they wanted to join a union where no explanation for inquiry was given was unlawful). Miriam Perez was interrogated by coordinator Lydia regarding whether she signed a union card and what the Union had offered employees. (SA 1 n.3, 12; A 155.) Soila Peguero was directed by coordinator Carmen Vasquez to speak to management before voting in a union election and told that Vasquez would help her vote. (SA 1 n.3, 12; A 167.)

The Company does not dispute (Br 60) the coerciveness of the interrogations before the Court. The Company's sole argument (Br 60) is that the coordinators who interrogated the employees were not stipulated to be supervisors within the meaning of the Act. However, in its answer to the General Counsel's complaint,

the Company admitted that certain individuals named in the complaint (A 817-18), including Lydia and Carmen Vasquez, "are employed by Special Touch as coordinators" and "that they are all agents of [the Company]." (General Counsel's Exhibit 1(G) at ¶ 8.) A finding that an interrogation is unlawful is not dependent upon the interrogator being a supervisor within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)) and will be upheld where the individual is an agent of the employer. *See Abbey's Transp. Serv. v. NLRB*, 837 F.2d 575, 578-79 (2d Cir. 1988) (concluding that interrogation about whether particular employees had signed union authorization cards by the employer's agent constituted unlawful interrogation). Therefore, substantial evidence supports the Board's finding (SA 1) that the Company violated Section 8(a)(1) when its coordinators interrogated the aides.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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April 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	No. 07-5422-ag
v.	*	
	*	Board Case No.
SPECIAL TOUCH HOME CARE SERVICES, INC.	*	29-CA-26661
	*	
	*	
Respondent	*	

COMBINED CERTIFICATES

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel makes the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 8,245 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRSUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the .pdf file containing a copy of the Board's brief that was sent by e-mail to the Court are identical to the hard copy of the Board's brief filed with the Court and served on the intervenor and respondent, and were scanned for viruses using Symantec Antivirus Corporate

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Dated at Washington, DC
this 10th day of April, 2008

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	*	
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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